SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 970

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BINKLEY MINING COMPANY OF MISSOURI,
*Petitioner,*

*vs.*

DAN H. WHEELER, Acting Director Bituminous Coal Division, Department of the Interior, HAROLD L. ICKES, Secretary of the Interior,
*Respondents.*

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## BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

An opinion in the above entitled cause was written and filed by the Acting Director of the Bituminous Coal Division, Department of the Interior, and appears in the printed record filed herein at page R. 140-148. An opinion was also written in the above cause by Judge Woodrough of the United States Circuit Court of Appeals for the Eighth Circuit, Sanborn and Thomas, Circuit Judges, concurring, and was filed February 10, 1943, and appears at pages R. 152-170 of the record. The Court's opinion is also reported in 133 F. (2d) pages 863-872.

## II.

### Jurisdiction.

1. Jurisdiction in this cause is based upon Judicial Code, section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (USCA Title 28, section 347) and upon section 6(b) 50 Stat. 85 (USCA Title 15, section 836, paragraph b) of the Bituminous Coal Act of 1937.

2. The date of the original judgment to be reviewed is February 10, 1943 (R. 152). Petition for rehearing was filed February 25, 1943, (R. 177) within the time for filing petitions for rehearing provided by the rules of the United States Circuit Court of Appeals, Eighth Circuit, and was denied March 5, 1943 (R. 179).

## III.

### Evidence.

A sufficient summary of the facts to present the questions involved is presented in the attached Petition for Writ of Certiorari. We do desire to call the Court's attention to the fact that the evidence is undisputed and came entirely from witnesses produced by the Coal Division "to sustain the issues in its behalf" (R. 39).

## IV.

### ARGUMENT.

**The Circuit Court of Appeals erred in holding that the Bituminous Coal Act of 1937 charged the Bituminous Coal Division with the duty of fixing, maintaining and enforcing code prices.**

1. The Bituminous Coal Act of 1937 stems from the original Coal Conservation Act of 1935 and, with certain

labor provisions eliminated on account of the decision of this court in *Carter* vs. *Carter Coal Company*, 298 U. S. 238 (1936) is substantially the same as the original Act. Extensive hearings were held on the original Act before a subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, first session, and a perusal of the evidence adduced at these hearings establishes, beyond peradventure of a doubt, that the Bituminous Coal Act was conceived and written by the coal industry itself; it has been held uniformly that the principal object of the Act was to eliminate the evil of cut-throat competition and to stabilize the industry. The industry, acting on its own, could not stabilize the markets through price fixing agreements without running afoul of the Sherman Act. The scheme of regulation provided in the Act is unlike any other heretofore considered by this Court; the regulatory provisions are not in the form of rigid prohibitions. Membership in the code (and the code is the heart of the regulatory measure) is voluntary. District Boards composed solely of representatives of the coal industry are set up, not as governmental agencies, but as separate entities with definite functions to perform, all under the surveillance of the Bituminous Coal Division. The provisions of the Act unmistakably indicate that the district boards were to play a large part in the administration of the Act. Mr. Henry Warrum, author of the Act, testifying before the sub-committee at the hearing on HR-8479, supra, said as much in no uncertain words.[1]

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[1] In answer to the direct question "What are the duties of the District Board? What do they do?" Mr. Warrum made the answer: "They do practically everything in connection with the administration of this Act." (See report of hearings before sub-committee of the Committee on Ways and Means, House of Representatives, 74th Congress, first session on HR-8479, page 65.) The Attorney General's Committee on Administrative Procedure, in Monograph No. 23, Vol. 1, note 5 on page 2, makes the comment, "It is worth noting that the statute is more an example of federal assistance than of federal regulation."

Notwithstanding the manifest intent gathered from the legislative history of the Act, and notwithstanding the fact that the Act itself contains no delegation of the general power of enforcement, the Bituminous Coal Division has construed the Act to charge it with the duty not only of establishing a minimum price structure for the Bituminous coal industry but also with the duty of a rigid enforcement of the provisions of the code. Nothing in this Act even suggests such a broad delegation of power. In this connection it is to be noted that no penalty, as a penalty, is fixed by any of the terms of the Act for any violation of the code.[2]

The Act makes specific provision for requiring compliance with the code. Section 4-II (j), which is part and parcel of the code itself, provides for written complaint by any code member, district board or member thereof, state or political subdivision of a state or the Consumers Counsel, charging a *violation* of the code, and makes it the mandatory duty of the Commission to make due effort toward adjustment of such complaint and to endeavor to compose the difference of the parties, and delegates to the Commission the power to make such order or orders as

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[2] In the debate in Congress on the passage of the original bill, Congressman Samuel B. Hill, in the House Congressional Record, Vol. 79, part 12, page 13445, used the following language: "This is not an imposed code, this is a voluntary code. The code provided for * * * * * shall be binding upon those who sign the code and none other * * * * You will recall that under NRA 75% of the industry signing a code made it binding upon the members of the industry. That is not true in this case. Only those members who sign a code are bound by it and the basis of enforcement of the terms of the code is the contract of mutual obligation to which they subscribe in signing the code * * * * THE CODE ITSELF IS A MATTER OF VOLUNTARY AGREEMENT AND THERE IS NOT A SINGLE PENAL PROVISION IN IT." And Congressman Underwood, in speaking for the bill, House Congressional Record, Vol. 79, part 12, page 13474, made the following statement: "The Guffey-Snyder coal bill provides for a minimum amount of governmental regulation to insure the orderly conduct and stabilization of the Bituminous coal industry."

the facts and circumstances warrant. It is to be noted that this method of requiring compliance with the code creates a right in all persons interested or who might be interested in the code member's compliance, and it is also to be noted that this method of requiring compliance is entirely consistent with the theory of a self-regulated industry under government supervision and not a rigid statutory prohibition. Section 5 (b) of the Act delegates to the Bituminous Coal Division the power to revoke code membership or issue cease and desist order upon written complaint by any code member, district board or any state or political subdivision of a state or the Consumers Counsel after a hearing upon proof that the code member has *wilfully* violated any provision of the code or any regulation made thereunder, and further provides that at such hearing, in addition to the qualified complainants, any consumer or employee and the Commissioner of Internal Revenue shall be entitled to present evidence and be heard. This provision is entirely consistent with the theory of self regulation under Government supervision, and was apparently intended to permit the designated persons to require compliance with the code by those members of the code who proved recalcitrant, was clearly intended to be used only in flagrant cases of violation. The Coal Division, however, has insisted upon construing 4-II (j) and 5 (b) together,[3] and has construed the powers granted in section 5 (b) as applicable to section 4-II (j) and has, in the daily administration of the Act, acted upon that construction. The Circuit Court of Appeals, Eighth Circuit, have apparently overlooked the fact that 4-II (j) is the provision applicable

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[3] Memorandum opinion of Director (R. 140-143) contains the following statement:

"These proceedings were instituted upon complaints filed with the Bituminous Coal Division ("Division") on June 12, 1941, pursuant to the provisions of section 4-II(j) and 5(b) of the Bituminous Coal Act of 1937."

in the event of "violation" and 5 (b) is applicable in the event of "wilful violation", and have affirmed the Coal Division in its construction. The Coal Division, by such a construction, has endeavored to supply a penalty where none was intended and the manifest intent of Congress was otherwise. Obviously it is of the utmost importance to every member of the code and to the Coal Division that they authoritatively know whether or not the Division has been delegated the broad power, upon its own motion, to insist upon a rigid and scrupulous compliance with the code, and whether or not a mere mistake will subject a code member to the harsh proceedings provided in section 5 (b), which may result in the revocation of his code membership and the payment of a substantial penalty, or the issuance of a cease and desist order. It is quite important that the district boards, code members and Consumers' Counsel know definitely their place in the scheme of regulation provided by the Act.

**The Circuit Court of Appeals erred in holding that the Act conferred upon the Division any authority to enforce the provisions of the code of its own motion.**

2. The only general authority conferred upon the Commission is the authority to make and promulgate all reasonable rules and regulations for carrying out the provisions of the Act. None of the provisions of the Act delegate any general power to enforce the provisions of the code. As a matter of fact, specific provisions to enforce compliance with the code are set out in Section 4-II (j) of the code itself, and section 5 (b) hereinabove referred to and these provisions specifically limit the power to file written complaints of either *violation* or *wilful* violation to the persons specifically designated in the act as qualified complainants. It is noticeable that the Bituminous Coal Commission or Bituminous Coal Division are not among those

named as qualified complainants or as authorized to present evidence and be heard at the hearings. It is also to be noted that the delegation of the right to file complaints is not delegated to the district board alone, is not mandatory but is discretionary and delegated to the District Board, any code member, any state or political subdivision of a state or the Consumers' Counsel; it would seem of prime importance in the administration of this Act that this court give an authoritative decision of this question, to the end that the Act may be administered within the purpose and intent of Congress in its enactment.

**The Circuit Court of Appeals erred in holding that the Division was authorized by the Bituminous Coal Act of 1937, in its own name and on its own behalf, to prosecute, hear and determine a written complaint filed by an authorized complainant, notwithstanding the filing of a request by the sole complainant to withdraw the complaint, and notwithstanding the joint motion of the complainant and defendant to dismiss the complaint.**

3. This record discloses that the complainant filed the complaint on information furnished by the consuming area auditor of the Bituminous Coal Division (R. 10). It also discloses that after the signing of the complaint by the Secretary of the District Board, the District Board held a meeting and considered the charges and the evidence in relation thereto, and came to the conclusion that no wilful intent to violate the Act was involved, and directed the Secretary to move for the withdrawal of the charge heretofore filed (R. 19-23). The Secretary moved for the withdrawal of the charge and the motion was denied by the Director (R. 24). At the hearing the only evidence introduced by the complainant was a certified copy of the resolution authorizing the withdrawal of the charge. The Coal

Division in its own behalf was then permitted, over objection, to introduce evidence "to sustain issues in its behalf" (R. 39). The complaint under consideration was clearly filed under section 5 (b) (R. 10); the complainant was not a governmental agency nor was it in any wise representing the public. It was, as constituted by the Act itself, a separate entity made up of persons interested in the coal industry, and exercising a private right conferred by the Act. No provision of this section or any other section of the Act makes provision whereby the Bituminous Coal Division could become a party to the proceedings with the right to produce evidence and be heard. The Director in his memorandum opinion seemed to rely upon necessity (R. 147). The Circuit Court of Appeals for the Eighth Circuit based its opinion upon the public interest involved, and also upon the provisions of section 6 (a). The Attorney General's Committee on Administrative Procedure, in Monograph No. 23, Vol. No. 2, on page 99 expressed some doubt as to the extent intended by the provision in section 6 (a) and suggests the wisdom of testing the possibilities of this section in court. The question suggested undoubtedly arises daily in the administration of the Act and should be authoritatively settled by this court.

The Circuit Court of Appeals, in its decision, relies upon the following cases: *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission,* 8th Circuit, 105 F. (2d) 559 l. c. 566; *Resources Corporation International* v. *Securities and Exchange Commission* (App. D. C. 1939), 103 F. (2d) 929; *Oklahoma-Texas Trust Co.* v. *Securities and Exchange Commission,* 10th Circuit, 100 F. (2d) 888-892; *Securities and Exchange Commission* v. *Hoover* (N. D. Ill.), 25 Fed. Supp. 484; In the matter of *Winnebago Distilling Co.,* 6 S. E. C. 926; In the matter of *Paper Sales Co. of Detroit* (Ind.), 2 S. E. C. 748. The first case above cited arises under the Bituminous Coal Act, but is clearly dis-

tinguishable from the present cause. It deals with a specific grant of power to the Coal Division. No such grant is involved in the present cause. All of the other cases cited deal with various constructions of the Securities and Exchange Act and are not in point by reason of the fact that they deal with a rigid, prohibitory, regulatory measure entirely different in both purpose and procedure from the act under consideration.

**The Circuit Court of Appeals erred in its construction of the term "wilful violation" as used in section 5(b) of the Act.**

4. Ordinarily, the use of the word "wilful" means intentional or deliberate. It would seem obvious that in section 5(b) of the Act it is used in its ordinary sense, since section 4-II(j) provides a method of requiring compliance with the code where violation only is concerned. It would seem clear that section 4-II(j) was intended to cover those cases involving mere violations of the code. It would seem equally clear that in the event a code member deliberately and intentionally violated the code, section 5(b) was intended as a rather harsh method of compelling compliance with the code (*Spies* v. *United States* (1943), — U. S. —, 87 L. Ed. 342 (Advance sheets)). Obviously the two sections were intended to be applicable to different factual situations, and the remedy for enforcement under the different facts was intended to be entirely different; the first mild and corrective, the second harsh and coercive. The Coal Division seems to insist on a construction that the two sections are the same and the Circuit Court of Appeals apparently concurs in this construction. Such a construction would not only be in conflict with all settled rules of construction, but is in direct conflict with the terms of the Act itself. Surely code members are entitled to know when they may be sub-

ject to a revocation of their code membership or the issuance of a cease and desist order.

**The Circuit Court of Appeals erred in holding that there was sufficient finding of facts to support the director's conclusion.**

5. While this might not, of itself, be sufficient to justify the issuance of a Writ of Certiorari from this court, we think that it is important that the requirements of the law as to findings of fact be at least substantially complied with. Administrative officers and bodies are required by reviewing courts to express their decision in formal and explicit findings of fact, to the end that the review may be intelligent, and we respectfully submit that no findings of fact, justifying the conclusion that the regulations had been wilfully violated, appear in the Director's findings or opinion. *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Baltimore & Ohio R. R.,* 293 U. S. 454; *United States* v. *Shoshone Tribe,* 304 U. S. 111; *Interstate Circuit Inc.* v. *United States,* 304 U. S. 55.

**The Circuit Court of Appeals erred in holding that there was substantial evidence to support finding of wilful violation.**

6. There is in this record no substantial evidence to support the conclusion of a "wilful violation" of the code. The undisputed evidence in this record discloses that if there was a violation of the minimum price fixed by the Coal Division, it was solely by reason of a mistake on the part of the Petitioner as to the applicable price and was neither intentional nor deliberate. The finding of "wilful violation" against a code member and the issuance of either a revocation order or a cease and desist order is, to those who feel that "wilful" indicates intentional or deliberate action, a matter of great importance. Integrity of a code

member's record should not be marred by such a finding, unless and until this court has authoritatively determined that the term "wilful violation" as used in section 5(b) of the Act means something other than deliberate and intentional.

The questions suggested in this application directly affect the daily administration of the Bituminous Coal Act of 1937, and we sincerely believe should be definitely settled by this Court.

Respectfully submitted,

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